STATE OF MICHIGAN
SUPREME COURT

AUDREY TROWELL, Plaintiff/Appellee, vs. PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., a Michigan nonprofit corporation. Defendant/Appellant.	Michigan Supreme Court No: Court of Appeals No: 327525 HON. COLLEEN A. O'BRIEN Oakland County Circuit Court Lower Court No: 14-141798-NO HON. COLLEEN A. O'BRIEN

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PLAINTIFF/APPELLEE AUDREY TROWELL'S RESPONSE IN OPPOSITION TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTER JURISDICTIONAL STATEMENT

The Defendant/Appellant in the lower court, Providence Hospital and Medical Center, Inc.'s ("Providence") Application for Leave to Appeal is without legal merit because it misstates the Court of Appeals' opinion in this matter and conflicts with settled precedent and court rules. Moreover, Defendant/Appellant now argues that the opinion at bar violates MCR 2.111(B)(1) because the Court of Appeals held that the allegations on the face of Plaintiff Audrey Trowell's ("Trowell") Complaint may possibly sound in ordinary negligence or medical malpractice, an outcome that the Michigan Supreme Court anticipated in *Bryant v. Oakpointe Villa Nursing Center*, 471 Mich. 411, 421 (2004). On this basis, the Defendant/Appellant now argues that the Plaintiff's Complaint did not provide *reasonable* notice as required by MCR 2.111(B)(1).

However, the Defendant/Appellant concedes that it failed to file a motion for more definite statement below. Instead, the Defendant/Appellant answered Plaintiff's Complaint and filed a Motion for Summary Disposition, based solely on the factual allegations contained therein, where it argued, incorrectly, that the factual allegations in the Complaint sounded exclusively in medical malpractice. However, the Defendant/Appellant's position is contrary to law as the fact-specific *Bryant* test demonstrates and even cautions that there is not a bright line between medical malpractice and ordinary negligence. Moreover, the opinion at bar merely illustrates the difficulty in applying the fact-specific *Bryant* test without being afforded the opportunity to conduct meaningful discovery.

Therefore, based on the foregoing, Defendant/Appellant's Application for Leave to Appeal does not meet the standard set forth in either MCR 7.305(B)(3) or MCR 7.305(B)(5)(a), because this case does not involve legal principles of major significance to the state's jurisprudence and the Court of Appeals' decision was not clearly erroneous.

STANDARD OF REVIEW

The Defendant/Appellant's Motion for Summary Disposition cited both MCR 2.116(C)(7) and (8), and its arguments focused solely on the allegations in the complaint; no documentary evidence was submitted. Defendant/Appellant argued in its Motion that all of Plaintiff/Appellee's claims sounded in medical malpractice, without conducting an analysis of each of Plaintiff/Appellee's claims. Upon conducting an analysis of each of Defendant/Appellant's claims, pursuant to the standard set forth in *Bryant v. Oakpointe Villa Nursing Ctr, Inc,* 471 Mich. 411, 419 (2004), the Court of Appeals correctly held that the allegations on the face of Plaintiff/Appellee's Complaint possibly sounded in ordinary negligence or medical malpractice. The resolution of a summary disposition motion brought under MCR 2.116(C)(8) is reviewed *de novo*. *Spiek v. Dep't of Transp.*, 456 Mich. 331, 337 (1998).

COUNTER-QUESTION PRESENTED

1. Whether the Court of Appeals correctly held that the Circuit Court erred when it granted Defendant/Appellant's Motion for Summary Disposition and further denied Plaintiff/Appellee's Motion for Reconsideration, without providing an opportunity for meaningful discovery, where the factual allegations on the face of Plaintiff/Appellee's Complaint possibly sounded in ordinary negligence or medical malpractice?

   Plaintiff/Appellee answers "Yes."

   Defendant/Appellant would answer "No."

   Court of Appeals answered "Yes."

COUNTER STATEMENT OF FACTS

SUBSTANTIVE FACTS:

On February 11, 2011, Plaintiff/Appellee, Audrey Trowell, was admitted to Providence Hospital in Southfield, Michigan for an aneurysm that caused a stroke. (Exhibit A-Plaintiff/Appellee's Motion for Reconsideration at 4). Plaintiff/Appellee's stroke caused her to go into cardiac arrest and she was placed in the intensive care unit in Defendant/Appellant's hospital. (*Id*.).

During her hospitalization, Plaintiff/Appellee was assisted by agents and employees of Defendant/Appellant hospital. (*Id*.). Despite Plaintiff/Appellee having been advised that two nurses needed to assist her to the bathroom, on several occasions, Defendant/Appellant periodically only employed one nurse to assist her. (*Id*.). On one occasion, Plaintiff/Appellee's nurse (upon information and belief, named "Dana" in Plaintiff/Appellee's Complaint; Defendant/Appellant later advised Plaintiff/Appellee's counsel that her name is "Dana McCorkle") was tasked with assisting Plaintiff/Appellee with using the bathroom. (*Id*. at 4-5). Although Ms. McCorkle was tasked with assisting Plaintiff/Appellee with using the bathroom, she dropped Defendant/Appellant, which causing Plaintiff/Appellee to hit her head on her wheelchair. (*Id*. at 5). Ms. McCorkle attempted to assist Plaintiff/Appellee again after dropping her, but instead she dropped Plaintiff/Appellee a second time. (*Id*.).

As a result of her falls, Appellant suffered a torn rotator cuff which has required multiple surgeries and treatment. (*Id*.). Further, an MRI revealed that Appellant had suffered bleeding of the brain as a result of being dropped by Appellee's nurse, Dana McCorkle. (*Id*.).

PROCEDURAL POSTURE:

On February 11, 2014, Plaintiff/Appellee filed the instant action against Defendant/Appellant in Wayne County Circuit Court, for injuries Plaintiff/Appellee suffered as a

result of Ms. McCorkle's actions. (*See generally* February 11, 2014 Complaint). Pertinent to the present appeal, Paragraphs 15 and 16 of the Complaint read as follows:

> 15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:
>
> a. Failure to ensure the safety of Plaintiff while in Defendant's hospital;
>
> b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;
>
> c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendant's hospital;
>
> d. Failure to properly train "Dana" and other nurses in how to properly handle patients such as Plaintiff;
>
> e. Failure to exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital;
>
> 16. Defendant hospital was negligent through its agents, employees, and staff in failing to ensure the safety of Plaintiff.

Pursuant to a stipulated order, the parties agreed to transfer the case to Oakland County Circuit Court. (*See* March 26, 2014 Transfer Order). On January 9, 2015, Defendant/Appellant filed its Motion for Summary Disposition, arguing, *only paragraphs b-e* , that Plaintiff/Appellee's Complaint, sounded exclusively in medical malpractice and that Plaintiff/Appellee had not fulfilled the notice requirements so her Complaint should have been dismissed. (*See generally* Defendant's Motion for Summary Disposition). Notably, *Appellee made no mention of Paragraph 15(a) of the Complaint*. Plaintiff/Appellee timely filed her response brief, arguing that the allegations set forth in Paragraphs 15 and 16, as cited above, sounded in ordinary negligence.

Oral argument was set and re-set a number of times. Prior to the time that it was finally set for April 8, 2015, Defendant/Appellant attempted to block the deposition of its nurse, Dana McCorkle, first through a motion to quash, filed on March 20, 2014, and then by canceling her

deposition the afternoon before it was scheduled to take place on the basis that Ms. McCorkle needed an unspecified "assistance" that Defendant/Appellant's counsel refused to identify. (*See* March 30, 2015 Letters and Email Correspondence with Wilson Copeland – Exhibit B). This maneuver assured that Plaintiff/Appellee would not be able to use Ms. McCorkle's testimony to respond to Defendant/Appellant's Motion for Summary Disposition.

The Circuit Court heard oral argument on Defendant/Appellant's Motion for Summary Disposition on April 8, 2015, at which time the Circuit Court read its opinion granting Defendant/Appellant's Motion into the record. (*See generally* April 8, 2015 Transcript). The Circuit Court specified the paragraphs of Plaintiff/Appellee's Complaint that it found problematic, again never referencing Paragraph 15(a).

On April 29, 2015, Plaintiff/Appellee filed her Motion for Reconsideration and to Amend the Complaint. (*See* April 29, 2015 Plaintiff/Appellee's Motion for Reconsideration and to Amend Complaint). In the amendment, Plaintiff/Appellee removed all but Paragraph 15(a),which neither Defendant/Appellant nor the Circuit Court identified as sounding in medical malpractice. On May 4, 2015, the Circuit Court denied Plaintiff/Appellee's Motion for Reconsideration and entered a separate order for Plaintiff/Appellee to set her Motion to Amend for a hearing and attach the Proposed Amended Complaint for the Circuit Court's review. (*See* May 4, 2015 Order Denying Motion for Reconsideration; *see* May 4, 2015 Order to Refile Motion to Amend Complaint.). Thereafter, Appellant filed a Motion to Amend her Complaint on May 11, 2015, attaching her Proposed Amended Complaint as an exhibit. (*See* Appellant's Motion to Amend Complaint, filed May 11, 2015). Notably, the proposed Amended Complaint modified Paragraph 15 as follows:

> 15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:
>
> a. Failure to ensure the safety of Plaintiff while in Defendant's hospital[.]

(*Id.*). Defendant/Appellant filed its response to Plaintiff/Appellee's Motion to Amend on May 22, 2015, alleging that the "failure to ensure safety" claim now sounded in strict liability. (*See* Defendant/Appellant's Response to Motion to Amend, filed May 22, 2015). On May 26, 2015, the Circuit Court denied Plaintiff/Appellee's Motion to Amend, finding that amendment would be futile because the Amended Complaint still sounded in medical malpractice. (*See* May 26, 2015 Order Denying Motion to Amend).

Plaintiff/Appellee filed a successful Claim of Appeal on May 22, 2016. On August 16, 2016, in a published opinion, a panel of the Michigan Court of Appeals reversed the Circuit Court's decision and held that the Circuit Court in erred in summarily dismissing Plaintiff/Appellee's Complaint solely on the factual allegations contained on the face of the Complaint, because the allegations possibly support a claim for ordinary negligence or medical malpractice. (Exhibit C- Michigan Court of Appeals-*Trowell v. Providence Hosp and Med Ctrs,* Docket No.__ (Mich. App. August 16, 2016).

ARGUMENT

I. DEFENDANT/APPELLANT'S FIRST QUESTION PRESENTED MISSTATES THE HOLDING OF THE MICHIGAN COURT OF APPEALS AND ERRONEOUSLY NEGLECTS TO CONSIDER THE WELL SETTLED LEGAL PROPOSITION THAT ONE SET OF FACTS MAY SUPPLY THE BASIS FOR MULTIPLE CAUSES OF ACTION, EVEN IF THE ACTIONS ARE INCONSISTENT.

Defendant/Appellant's argument is without legal merit because it misstates the Court of Appeals' holding in the case at bar. The issue below was whether the factual allegations on the face of the Plaintiff/Appellee's Complaint sounded exclusively in ordinary negligence or medical malpractice. The Court of Appeals held that the allegations on the face of the Plaintiff/Appellee's Complaint possibly sounded in ordinary negligence or medical malpractice; therefore, the trial court erred in summarily dismissing Plaintiff/Appellee's Complaint before affording Plaintiff/Appellee the opportunity to conduct meaningful discovery.

Defendant/Appellant now contends that the Court of Appeals violated MCR 2.111(B)(1) in holding that the factual allegations on the face of Plaintiff/Appellee's Complaint possibly sounded in both ordinary negligence or medical malpractice. Defendant/Appellant's argument is based on faulty premises that are contrary to settled law.

First, Defendant/Appellant position incorrectly assumes that Plaintiff/Appellee's Complaint is impermissibly vague because the allegations on the face of the Complaint can possibly support both a medical malpractice claim and ordinary negligence. However, the Michigan Supreme Court anticipated such an outcome in *Bryant* where it demonstrated and cautioned that there is no bright line between the two causes of action. Second, Defendant/Appellant Application is, in essence, a thinly veiled motion for a more definite statement that was not filed in the Circuit Court. Instead, it answered Plaintiff/Appellee's Complaint, and aggressively, but erroneously, argued that the allegations on the face of Plaintiff/Appellee's Complaint sounded *exclusively* in medical malpractice, despite the Court's

ruling to the contrary in *Bryant*. Last, the Defendant/Appellant neglects the significance of the fact that almost every case relied on by both parties and the Court of Appeals had the benefit of meaningful discovery prior to the trial court attempting to apply the fact-specific *Bryant* test. Thus, the Court of Appeals only commented on the vagueness of the Plaintiff/Appellee's Complaint in order to stress the importance of meaningful discovery before attempting to apply the fact-specific *Bryant* test. This argument inherently demonstrates that Defendant/Appellant had *reasonable* notice of the claims against it but that it failed to heed the warning pronounced in *Bryant*, demonstrating that there is no bright line between the two causes of action.

A. DEFENDANT/APPELLANT'S ARGUMENT IS CONTRARY TO SETTLED PRECEDENT AND COURT RULES WHICH PROVIDE THAT ONE SET OF FACTS MAY SUPPLY THE BASIS FOR MULTIPLE AND EVEN INCONSISTENT CAUSES OF ACTION.

Defendant/Appellant incorrectly argues that Plaintiff/Appellee's Complaint is impermissibly vague because the Court of Appeals held that the factual allegations on the face of her Complaint could possibly sound in ordinary negligence or medical malpractice. Defendant/Appellant goes on to argue the because the Court of Appeals could not make a finding that the facts exclusively sounded in one or the other, based on the face of the Complaint, that it was deprived of *reasonable* notice of the claims against it, in violation of MCR 2.111(B)(1). In fact, Defendant/Appellant goes on to support this premise by stating that medical malpractice claims and ordinary negligence claims are so different that one is akin to a "Siamese cat" while the other is akin to a "tiger." However, this assertion is not explained nor does it have any basis in law.

Bryant v. Oakpointe Villa Nursing Center, 471 Mich. 411, 421 (2004) demonstrates that the distinction between ordinary negligence and medical malpractice is not a bright line. To distinguish medical malpractice claims from negligence claims, there are two questions that must be asked. The first is "whether the claim pertains to an action that occurred within the course of a

professional relationship;" and the second is "whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Id.*at 422. If the answer is "yes" to both of these questions, then the action is considered medical malpractice. *Id*.

To determine whether a claim sounds in ordinary negligence or malpractice necessarily requires meaningful discovery. (See also *Van Buren v. Covenant Healthcare Sys*., No. 297019, (Mich. App. Jan. 5, 2012)(attached as Exhibit-D**)**. Although Defendant/Appellant states that a the difference between ordinary negligence and medical malpractice claims are vast, the Court in *Bryant* cautioned against such an assertion in holding that "[t]he fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." *Id*. at 422. (emphasis in original).

Finally, if the Court were to follow Defendant/Appellant's logic, future litigants would be precluded from pleading in the alternative, as permitted by MCR 2.111(A)(2) which provides:

> A party may (a) allege two or more statements of fact in the alternative when in doubt about which of the statements is true; (b) state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or on both.

The court rules anticipate that parties will not know all that facts at the start of litigation so it allows pleading allegations in the alternative, even if inconsistent, and allows a party to discover the actual facts during the course litigation to clarify the issue and facts of a case. *See Whitcraft v. Wolfe*, 148 Mich. App. 40 (1985); ("[t]hat court rules allow a party to set forth inconsistent claims. However, the actual facts of any case are made clear through the process of discovery.); *Domako v. Rowe*, 438 Mich. 347, 360 (1991)(holding that the purpose of discovery is the simplification and clarification of issues).

B. THE COURT OF APPEALS' DECISION DEMONSTRATES THE DIFFICULTY IN APPLYING THE *BRYANT TEST* WITHOUT THE BENEFIT OF MEANINGFUL DISCOVERY.

The Court of Appeals' reference to the vagueness of Plaintiff/Appellee's Complaint demonstrates the difficulty in applying the *Bryant* test based solely on the allegations contained on the face of a Complaint. The fact-specific *Bryant* test necessarily requires discovery to make the determination as to the nature of Plaintiff/Appellee's Complaint. Moreover, this point is further illustrated by the fact that the vast majority of the cases that Defendant/Appellant, Plaintiff/Appellee and the Court of Appeals relied on in this matter had the benefit of meaningful discovery before the trial court attempted to apply the *Bryant* test. Therefore the Defendant/Appellant's contention that the Court of Appeals violated MCR 2.111(B)(1), because it could not determine whether Plaintiff/Appellee's Complaint sounded in medical malpractice or negligence, is misplaced because the vast majority of the cases applying the *Bryant* test are not based solely on the face of the complaint.

The Court of Appeals previously acknowledged the difficulty in applying the *Bryan* test solely on the face of the complaint is a previous case. In *Van Buren v. Covenant Healthcare Sys*., No. 297019, at *1 (Mich. App. Jan. 5, 2012)(attached as Exhibit-D**)**, the plaintiff brought a negligence action against the defendant for performing a double mastectomy on her even though she did not have breast cancer. The plaintiff alleged multiple theories of liability concerning why the surgery was performed despite her negative biopsy. *Id*. Specifically, the plaintiff alleged a failure of clerical employees or medical employees to transmit and/or file the biopsy report and that the surgeon conducted the surgery without requesting and/or reviewing the biopsy report. *Id*. Instead of answering the complaint, the defendant filed a motion for summary disposition pursuant to MCR 2116(C)(7) and (C)(8), alleging that the plaintiff's claim sounded in medical malpractice, depriving plaintiff of the opportunity to conduct discovery. *Id*. The court granted the

motion. On appeal, the Court of Appeals reversed. In applying the *Bryant* test, the court held that the lower court prematurely dismissed the plaintiff's claim. The court reasoned:

> The instant complaint was necessarily drafted without access to proofs concerning which hospital employee was supposed to file the biopsy report, whether and when the report was actually filed and whether it was seen by or available to the surgeon. Indeed, other than knowing that her breasts were removed despite a biopsy report showing an absence of cancer, plaintiff, like the trial court, has actual knowledge of almost none of the salient facts. The complaint, accordingly, speaks broadly and encompasses both medical and non-medical personnel. Whether or not the persons ultimately responsible for the alleged miscommunication were medical professionals or clerks, secretaries or other non-medical personnel is not yet known, except perhaps to defendants. Moreover, even if some or all the relevant actions or omissions were committed by medical professionals, it was similarly premature for the trial court to determine whether those actions or omissions involved medical judgment.

Id. at 3.

Simply put, it is difficult to apply the *Bryant* test without the benefit of evidence to supplement the pleadings. Thus, based on the foregoing, the Court of Appeals' acknowledgment of the obvious difficulty in applying the *Bryant* test in proceeding that did not have the benefit of meaningful discovery is not significant although Defendant/Appellant argues to the contrary.

C. DEFENDANT/APPELLANT'S RELIANCE ON *LYONS* IS MISPLACED BECAUSE THE DEFENDANT/APPELLANT FAILED TO FILE A MOTION FOR MORE DEFINITE STATEMENT BELOW AND INSTEAD, INCORRECTLY, ARGUED THAT PLAINTIFF/APPELLEE'S COMPLAINT SOUNDED EXCLUSIVELY IN MEDICAL NEGLIGENCE ALTHOUGH THERE IS AMPLE PRECEDENT TO THE CONTRARY.

Defendant/Appellant concedes that it failed to file a motion for more definite statement below. "The court rule states that the answering party may move for a more definite statement before filing his responsive pleading if a pleading is so vague or ambiguous that it fails to comply with the requirements of the rules." *Lyons v. Brodsky*, 137 Mich. App. 304, 310 (1984); MCR

2.115(A). A motion for a more definite statement must be filed and served within the time for filing a responsive pleading. MCR 2.108(B).

Here, the Defendant/Appellant argued that Plaintiff/Appellee stated a claim, exclusively, for medical malpractice and that none of allegations in Plaintiff/Appellee's Complaint could supply the basis for an ordinary negligence claim. Although this assertion is contrary to law, it clearly reveals that Defendant/Appellant had *reasonable* notice of the claims against it, as required by MCR 2.111(B)(1) as it necessarily hard to make an analysis of the facts provided.

Moreover, the issue in *Lyons* concerned whether the plaintiff alleged enough facts to state a claim for medical malpractice, whereas here, the issue is whether the Plaintiff's/Appellee's Complaint sounded in medical malpractice or ordinary negligence. This is an important distinction, as the latter assumes that the Plaintiff /Appellee provided *reasonable* notice to the Defendant/Appellant as to the nature of the claim against it, as required by MCR 2.111(B)(1), enabling the Defendant/Appellant to not only answer the Complaint but to make arguments concerning the nature of the claim against it. Therefore Defendant/Appellant's contention that it did not *reasonable* notice lacks legal merit.

II. THE COURT OF APPEALS CORRECTLY REMANDED PLAINTIFF/APPELLEE'S CASE FOR ADDITIONAL PROCEEDINGS BECAUSE THE FACTUAL ALLEGATIONS ON THE FACE OF THE COMPLAINT COULD SOUND IN ORDINARY NEGLIGENCE.

The Michigan Court of Appeals has held that "[m]edical professionals may be liable for ordinary negligence as well as for malpractice." *MacDonald v. Barbarotto*, 161 Mich. App. 542, 549 (1987). *See also Adkins v. Annapolis Hospital*, 420 Mich. 87, 95, n. 10 (1984); *Becker v. Meyer Rexall, Drug Co.*, 141 Mich. App. 481 (1985); and *Nemzin v. Sinai Hospital*, 143 Mich. App. 798, 804 (1985). In *Bryant v. Oakpointe Villa Nursing Center*, 471 Mich. 411,421-22 (2004), the Michigan Supreme Court held "[t]he fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice." (emphasis in original).

To distinguish medical malpractice claims from negligence claims, there are two questions that must be asked. The first is "whether the claim pertains to an action that occurred within the course of a professional relationship;" and the second is "whether the claim raises questions of

medical judgment beyond the realm of common knowledge and experience." *Id*. If the answer is "yes" to both of these questions, then the action is considered medical malpractice. *Id*.

In the present case, Plaintiff/Appellee's Complaint alleged that Defendant/Appellant was negligent in the following ways:

a. Failure to ensure the safety of Plaintiff/Appellee while in Defendant/Appellant's hospital;
b. Failure to properly supervise the care of Plaintiff/Appellee while in Defendant/Appellant's hospital;
c. Failure to provide an adequate number of nurses to assist Plaintiff/Appellee while in Defendant/Appellant's hospital;
d. Failure to properly train Dana McCorkle and other nurses in how to properly handle patients such as Plaintiff/Appellee;
e. Failure to exercise proper case to prevent Plaintiff/Appellee from being injured while in Defendant/Appellant's hospital.

These allegations sound in negligence, as opposed to medical malpractice. Applying the analysis in *Bryant*, the answer to the first *Bryant* factor – whether there exists a professional relationship – is not in dispute. The fall which Plaintiff/Appellee suffered was within the course of a professional relationship with Defendant/Appellant's nurse, Dana McCorkle, while she was a patient.

The second *Bryant* factor – whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience – must also be answered in the negative, is whether Defendant/Appellant was negligent for dropping Plaintiff/Appellee twice does not involve medical judgement and is within the common knowledge of a jury.

A. THE LINE OF "FALLING" AND/OR "DROP" CASES IN MICHIGAN HAVE *ALL* BEEN HELD TO SOUND IN ORDINARY NEGLIGENCE.

Plaintiff/Appellant was dropped by Defendant/Appellant's employee, Dana McCorkle. The Michigan Court of Appeals has definitively held that "a claim by a patient who has fallen in a hospital or other licensed health facility may be brought against that facility as a medical malpractice claim or as a claim for ordinary negligence." *McLeod v. Plymouth Court Nursing Home*, 957 F.Supp. 113 (E.D. Mich., 1997). *See also MacDonald v. Barbarotto*, 161 Mich. App. at 549. Notably, **in all cases that Appellant located which involved falls or drops in a hospital or licensed healthcare facility in Michigan, the courts have found that the plaintiffs' complaints sounded in *ordinary negligence***. The reason for this is clear: the *Bryant* test focuses on whether the facts of the individual claim – not the words used in the complaint –would require some degree of "heightened knowledge" in order for the jury to understand what occurred. The courts who have considered the question have all agreed that there is no special knowledge needed to figure out whether a health care facility can be found liable for dropping a patient and causing injuries.

In *McLeod*, the plaintiff, a nursing home resident, filed an ordinary negligence claim against the defendant nursing home, claiming that as a result of the defendant leaving her wheelchair unlocked, the plaintiff fell while attempting to get to her wheelchair and fractured her hip. The nursing home attempted to dismiss the action on the basis that the plaintiff failed to file a written notice of her intent to file a claim, as required by medical malpractice law. The court allowed the plaintiff's claim to proceed on her ordinary negligence claim, finding:

> Plaintiff here alleges in her complaint that defendant breached its duty of reasonable care, the duty element required for ordinary negligence. No reference is made to any breach or violation of a duty to exercise the degree of skill, care, or diligence exercised by hospitals in the same or similar locality.

McLeod, 957 F.Supp. at 115. The district court further found that "the facts alleged present issues within the common knowledge and experience of the jury rather than those of medical judgment." *Id.*

In *Gold v. Sinai Hospital of Detroit, Inc.*, the plaintiff patient told the nurse employed by the defendant hospital that she felt dizzy and "would not be able to make it." 5 Mich. App. 368, 369 (1966). Having received assurance from the nurse that she would brace the plaintiff from behind, the plaintiff attempted to move from a sitting position to a prone position. *Id.* However, the nurse's promised assistance went unfulfilled, and the plaintiff fell and was injured. *Id.* Similarly, in *Fogel v. Sinai Hospital of Detroit*, 2 Mich. App. 99 (1965), the plaintiff patient requested assistance from a nurse's aide to get to the bathroom. The plaintiff cautioned the aide that she would need more than one aide, but the aide still decided to help her on her own. The plaintiff fell and was injured.

Upon facts virtually identical to the present case, the Michigan Court of Appeals found that *neither* of these cases brought forth a malpractice question, but rather sounded in ordinary negligence. Neither of these two "drop" cases required expert testimony because the question of whether there was a breach of the alleged duty of care could be appropriately answered by a jury.

In *Sheridan v. West Bloomfield Nursing & Convalescent Center, Inc.*, No. 272205, (Mich. App. March 6, 2007) (attached hereto as **Exhibit E**), the plaintiff representative alleged that the defendants were negligent when two nurses dropped the plaintiff while she was being transported from her bed to a wheelchair using a "'gait belt.'" *Id.* at 2. The Michigan Court of Appeals held that the trial court erred in dismissing the claims in plaintiff's amended complaint, stating:

> Plaintiff is not challenging the decision to move the decedent from her bed, the decision to use a gait belt, or the manner in which the gait belt was fastened to her body. The sole issue is whether, having decided to use and having secured the gait belt, defendants acted reasonably when they failed to maintain a secure grip on plaintiff's decedent and dropped her or allowed her to fall on the floor. Resolution

> of this issue is within the common knowledge and experience of an ordinary juror and does not require expert testimony concerning the exercise of medical judgment.
>
> *Id.*

In the present case, Plaintiff/Appellee was dropped twice by Defendant/Appellant's employee, Dana McCorkle. The reasoning in *McLeod, Sheridan, Gold and Fogel* all support the argument that expert testimony concerning the exercise of medical judgment is not required in order for a jury to decide whether a dropping a patient is negligence. In fact, Defendant/Appellant *did not present one single case in which a patient drop case was found to not involve ordinary negligence.* Plaintiff/Appellee is not challenging the use of any medical treatment or action, but is asking whether Defendant/Appellant acted reasonably when its employee failed to keep Plaintiff/Appellee within her grasp, *twice*. The facts are clear; and a jury, without testimony from an expert, would be able to discern that Plaintiff/Appellee was not handled properly.

B. PLAINTIFF/APPELLEE'S FAILURE TO TRAIN CLAIM SOUNDS IN ORDINARY NEGLIGENCE.

In *Bryant,* the plaintiff alleged that the defendant hospital was negligent, including the failure to train the nursing assistants to "recognize and counter the risk of positional asphyxiation post by bed rails." *Bryant*, 471 Mich. at 414. In this case, the Michigan Supreme Court held that this specific allegation would fall under medical malpractice because assessing the risks of asphyxia would require expert testimony. *Id.* at 425. Importantly, the court went on to say, "That is not to say, however, that all cases concerning failure to train health care employees in the proper monitoring of patients are claims that sound in medical malpractice. The pertinent question remains whether the alleged facts raise questions of medical judgment or questions that are within the common knowledge and experience of the jury." *Id.*

Applying this reasoning to the case at hand, simply because Plaintiff/Appellee alleged that Defendant/Appellant failed to properly train Dana McCorkle does not automatically render this a

malpractice action. As established, Dana McCorkle was not engaged in administering any form of medical care or treatment, and the breach of duty did not arise from the administration of professional medical treatment. She was assisting Plaintiff/Appellee to the bathroom. There is no question regarding professional medical judgment, unlike in *Bryant*, where the fact finder needed expert testimony to determine whether the nurses were adequately trained in restraint systems. The question of whether Defendant/Appellant failed to properly train Dana McCorkle to prevent Plaintiff/Appellee from being injured is one that can and should be answered without any specialized knowledge, by a jury.

C. DEFENDANT/APPELLANT'S FAILURE TO SUPERVISE AND FAILURE TO PROVIDE ADEQUATE NURSES CLAIMS SOUND IN ORDINARY NEGLIGENCE.

Plaintiff/Appellee also stated claims for failure to supervise and failure to provide adequate nurses in her first Complaint. While Defendant/Appellant initially likened the present case to *Bronson v. Sisters of Mercy Health Corp.*, 175 Mich. App. 647 (1989), it is not true that all claims for supervision and selection of staff constitute medical malpractice; certainly, these claims are frequently brought outside of the medical facility context. As argued above, the central question is whether these claims raise questions of medical judgment beyond any potential jury's common knowledge and experience, per *Bryant*.

In *Bronson*, the plaintiff filed an ordinary negligence action against her doctor because she suffered cardiorespiratory arrest as a result of the doctor's administration of an epidural steroid block. *Id*. at 648. Based on the facts, the Court of Appeals held that the plaintiff's claims concerning supervision and selection and retention of medical staff were claims based in malpractice. *Id*. at 654. However, this does not necessitate that all claims relating to supervision or selection of staff issues are grounded in malpractice. As with any legal analysis of a case, the facts surrounding the claims must be considered. In *Bronson*, the plaintiff claimed that the

defendant hospital was negligent because it granted staff privileges to the doctor, failed to discover that the doctor was no longer competent, failed to supervise the competency of the doctor, failed to fully investigate prior acts of negligence by the doctor, failed to take disciplinary action against the doctor, and failed to revoke the doctor's staff privileges. *Id*. at 648.

Unlike the present case, the doctor in *Bronson* was actually engaged in performing allegedly negligent medical treatment. The plaintiff's claim regarding medical staffing was an issue of competency, which could not reasonably be judged by a jury. In the case at hand, simply because Plaintiff/Appellee alleged failure to supervise Plaintiff/Appellee's care and failure to provide adequate nurses, for instance, does not automatically render this a malpractice action. Plaintiff/Appellee was informed that she needed two nurses to assist her to the bathroom. The fact that only one nurse assisted her, even after she fell the first time, is evidence that there was a lack of supervision and an adequate number of nurses.

Further, as noted above, when analyzing this case under the *Bryant* standard, these omissions can and should be evaluated without expert testimony, as they may be easily be grasped by the jury. A jury could easily assess that Defendant/Appellant should have had more assistance in lifting Plaintiff/Appellee who was a serious fall risk.

D. PLAINTIFF/APPELLEE'S NEGLIGENCE CLAIMS IN HER COMPLAINT MUST BE PRESERVED.

Plaintiff/Appellee believes that all of her claims in her first Complaint sound in negligence because the basis of her claim is simple for a jury to comprehend. However, even if this Court were to find that her failure to train claim sounded in medical malpractice, Plaintiff/Appellee has viable claims that clearly sound in ordinary negligence, as previously demonstrated. Thus, even if it were proper for the district court to strike some of the claims within Plaintiff/Appellee's original Complaint, the court should have allowed Plaintiff/Appellee to proceed on those claims which sounded in ordinary negligence.

In *Sawicki*, the Michigan Court of Appeals also preserved the plaintiff's ordinary negligence claims, holding that "[b]ecause. . . some of plaintiffs' claims sound in ordinary negligence, it does not fully constitute a claim sounding in medical malpractice and will survive despite the existence of the medical malpractice claims." *Sawicki,* Slip Op. at 6; s*ee also McIver*, Slip Op. at 7.

The Michigan Supreme Court has stated:

> Our legal system is also committed to a countervailing policy favoring disposition litigation on the merits, *see Hurt v. Cambridge*, 21 Mich App 652; 176 NW2d 450 (1970), which will frequently be found to be overriding. Thus, appellate courts have often warned "that dismissal with prejudice is . . . to be applied only in extreme situations."

North v. Department of Mental Health, 427 Mich. 659, 662 (1986) (internal citations omitted). Appellant should be allowed to proceed to trial on the merits of her clearly valid claims, rather than being left with no recourse at all, where it is clear that Defendant/Appellant did something wrong for which Plaintiff/Appellee should be compensated.

III. THE COURT OF APPEALS CORRECTLY DECLINED TO FIND THAT PLAINTIFF'S FAILURE TO ENSURE SAFETY SOUNDED CLAIM SOUND IN STRICT LIABILITY.

In *Bryant*, 471 Mich. at 425-26 (2004), the Court held "[p]laintiff's first claim is that defendant failed to assure that plaintiff's decedent was provided with an accident-free environment. This is an assertion of strict liability that is not cognizable in either ordinary negligence *or* medical malpractice." This holding does not represent a general rule concerning the nature of all failure to ensure safety claims as the Defendant/Appellant suggests. To the contrary, the Court made a fact specific finding that the plaintiff's failure to ensure claim as plead sounded in strict liability.

Although the Defendant/Appellant has revised its argument for the purpose of this appeal, below, Defendant/Appellant's response to Plaintiff/Appellee's Motion to Amend argued *solely*

that the Amended Complaint sounded in strict liability because of the unreported Court of Appeals case *Jackson v Harper Hospital*, 2006 Mich. App. LEXIS 2648 (September 12, 2006) (attached as **Exhibit H**). In *Jackson*, the Court of Appeals found that a claim of "failing to insure the safety and security of all patients being treated or examined in its facilities" constituted strict liability because the plaintiff did "not correlate the claim to any particular breach." *Jackson*, 2006 Mich. App. LEXIS at *12. Unlike in *Jackson*, Plaintiff/Appellee's Amended Complaint makes clear that the safety failure was with respect to the conduct complained of and directed at *her* specifically, not any and all unidentified patients. Further, the paragraphs preceding Paragraph 15(a) of the Amended Complaint make clear the source of the breach:

> …
>
> 10. On one occasion, Defendant/Appellant's nurse Dana McCorkle was tasked with assisting Plaintiff/Appellee with using the bathroom.
>
> 11. Although Nurse McCorkle was tasked with assisting Plaintiff/Appellee with using the bathroom, she dropped Plaintiff/Appellee, which caused Plaintiff/Appellee to hit her head on her wheelchair.
>
> 12. Nurse McCorkle attempted to assist Plaintiff/Appellee again after dropping her, but instead she dropped Plaintiff/Appellee a second time.
>
> 13. As a result of her falls, Plaintiff/Appellee suffered a torn rotator cuff which has required multiple surgeries, and treatment continues into the present time.
>
> 14. Further, an MRI revealed that Plaintiff/Appellee had suffered bleeding on the brain as a result of being dropped by Defendant/Appellant's nurse.
>
> …

Thus, it is abundantly clear that the failure to ensure safety claim relates to this one instance of conduct, which forms the basis of the entire action. This is not an allegation that every patient in the hospital was unsafe, such as that found in the complaint in *Jackson*. Moreover, as

Plaintiff/Appellee previously argued above, the failure to ensure safety claim sounds in ordinary negligence. A jury would not need any expert assistance to determine if Plaintiff/Appellee being dropped twice by Defendant/Appellant's nurse constituted a failure to ensure her safety. Thus, even if the Court finds that the original Complaint sounded in medical malpractice, Plaintiff/Appellee should have been permitted to proceed on her "failure to ensure safety" claim in her Amended Complaint.

IV. THE COURT OF APPEALS PROPERLY HELD THAT PLAINTIFF/APPELLEE ALLEGED FACTS ASSERTING A FAILURE TO TAKE CORRECTIVE ACTION AND FACTS SOUND IN ORDINARY NEGLIGENCE.

In *Bryant*, the plaintiff alleged that the defendant hospital failed to take steps to protect plaintiff because defendant had notice of the plaintiff's risk of asphyxiation and yet "did nothing to rectify it." A71 Mich at 429. The Supreme Court held:

> This claim sounds in ordinary negligence. No expert testimony is necessary to determine whether defendant's employees should have taken some sort of corrective action to prevent future harm after learning of the hazard. The factfinder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges.

Id.

The "failure to take steps" allegation in *Bryant* is similar to the "failure to take corrective action" allegation in *Sawicki v. Katzvinksy*, No. 318818 (Mich. App. March 17, 2015) (attached hereto as **Exhibit F**). In *Sawicki*, whose facts are similar to those in the present matter, the plaintiff sustained injuries after she fell from a raised toilet seat at defendant's hospital. The plaintiff underwent knee replacement surgery and was being assisted by a technical partner at the hospital. *Id*. at 1. The plaintiff testified that she yelled "Whoa!" once she sat down on the seat. *Id*. The hospital employee still left her alone despite being aware of the risks posed by the unsteady toilet seat and her risk of falling due to her physical condition. *Id*. The court held that:

"'No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem.'" *Id*. at 3 (citing *Bryant*, 471 Mich. at 431). The court further held, "Accordingly, this claim does not involve medical judgment, nor does it require knowledge of the standards of care applicable to medical caregivers or knowledge of technical or scientific matters." *Sawicki*, Slip Op. at 3.

In *McIver v. St. John Macomb Oakland Hospital*, No. 303090 (Mich. App. October 2, 2012) (attached hereto as **Exhibit G**), the plaintiff, who suffered from multiple sclerosis and dementia, fell from a chair that had been placed on a wet floor in her hospital bathroom. *Id*. at 1. Because of her history of falling, the hospital utilized restraints, and before her fall, the staff noted her unsteadiness and confusion. The plaintiff brought a negligence action against the hospital. *Id*. at 1-2. The court held:

> The narrow allegation that McIver was left alone in the bathroom after being seated on an unsafe chair placed on a wet floor sets forth a claim within the realm of a jury's common knowledge and experience. Laypersons are capable of understanding these simple facts. No expert testimony is necessary to establish that it is unreasonable to direct a patient to sit in an unstable chair located on a wet floor, particularly a patient suffering from dementia and unsteadiness. Nor do we detect any scientific or technical basis for expert testimony, given these allegations. Accordingly, McIver's negligence claim relating to her placement in the chair sounds in ordinary negligence.

Id. at 5.

In the present case, Plaintiff/Appellee alleged failure to exercise proper care and failure to ensure safety, both of which sound in ordinary negligence. The reasoning set forth in *Bryant*, *Sawicki*, and *McIver*, which clearly demonstrate that no expert testimony is necessary to assess a defendant's negligence in cases where the plaintiff had a risk of falling, warrants application to the present case. For instance, just as with the defendants in these three cases, Dana McCorkle was or should have been aware of Plaintiff/Appellee's physical condition, which put her at a high risk of

falling. Defendant/Appellant was aware of Plaintiff/Appellant's vulnerabilities and "either disregarded the risks or neglected to address them." *McIver*, Slip Op. at 6.

Further, Dana McCorkle was also aware that Plaintiff/Appellee required two nurses to assist her, yet negligently attempted to support Plaintiff/Appellee by herself in the restroom, without assistance. Moreover, after dropping Plaintiff/Appellee the first time, Ms. McCorkle failed to seek assistance again, and thus dropped Plaintiff/Appellee a second time. For both falls, she was aware of the aforementioned conditions and failed to take the necessary steps to protect Plaintiff/Appellee. In this case, ensuring that Plaintiff/Appellee did not fall did not require any specialized or scientific knowledge, but rather common sense, and in the words of the court in *McIver*, was a matter of "routine decision-making." *Id*.

RELIEF REQUESTED

Defendant/Appellant Application for Leave to Appeal should be denied. Defendant/Appellant's Application is without legal merit and contrary to settled law. The Court of Appeals' Decision was correctly decided.

WHEREFORE, for the foregoing, Plaintiff/Appellee respectfully requests that this Court deny Defendant/Appellant Application for Leave to Appeal and the Court of Appeals Decision to stand.

Respectfully Submitted,

CARLA D. AIKENS, P.C.

/s/ Carla D. Aikens_____
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Dated this 21st day of October, 2016

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was submitted to the Michigan Court of Appeals and served upon all parties to the above cause to each of the attorneys of record herein by efiling on October 21, 2016, by:

/s/ __Carla Aikens